92-143

Supreme Court
FILED
JUL 2
OFFICE OF

No. _____

In The

Supreme Court of the United States

_____ Term, 1992

EUGENE E. NEARBURG,

Petitioner,

v.

BAMERILEASE CAPITAL CORPORATION

Respondent,

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Richard Jackson
Counsel of Record
Richard Jackson & Associates
3738 Oak Lawn, Suite 101
Dallas, Texas 75219
Telephone - (214) 522-5977
Facsimile - (214) 522-5978

Attorneys for Petitioner

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

QUESTION PRESENTED

I. Does the Sixth Circuit Court of Appeals policy of summarily enforcing settlement agreements between litigants without affording them a full trial under appropriate Federal Procedural Rules and Federal Rules of Evidence deprive those litigants of their right to due process under the United States Constitution?

LIST OF PARTIES

Petitioner: Eugene E. Nearburg

Respondent: Bamerilease Capital Corporation

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	3
CONSTITUTIONAL PROVISIONS INVOLVED	3
REASONS FOR GRANTING THE WRIT	3
CONCLUSION	6
APPENDICES	8

TABLE OF AUTHORITIES

Cases	Pages
Aro Corporation v. Allied Witan Co., 531 F.2d 1368	3
Kukla v. National Distillers Prods. Co., 483 F.2d 619 (6th Cir., 1973)	3
Brock v. Scheuner, 841 F.2d 151 (6th Cir., 1988)	3
Sugardale Foods, Inc. v. Uncle Bens, Inc., No. 88-3641, unpublished op., 1989 U.S. App. Lexis 3050 (6th Cir. March 14, 1989)	3
Cleveland Board of Educ. v. Loudermill, 470 U.S. 532, 542 (1985)	6
United States v. Raddatz, 447 U.S. 667 (1980), *rehearing denied* 448 U.S. 916 (1981) *quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)	6
Doe v. Staples, 706 F.2d 985, 990 (6th Cir. 1983)	6
Constitution	
The Fourteenth Amendment to the United States Constitution	3
Secondary Sources	
C.A. Wright & K.W. Graham, *Federal Practice and Procedure*: Evidence §5052 at 252 (1977)	5
10J. Moore, *Moore's Federal Practice* §104.12[1] (2d ed. 1985)	5

No. _____

In The

Supreme Court of the United States

_____ Term, 1992

EUGENE E. NEARBURG,

Petitioner,

v.

BAMERILEASE CAPITAL CORPORATION

Respondent,

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Eugene E. Nearburg ("Nearburg") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on March 3, 1992.

OPINIONS BELOW

This case was originally filed in the United States District Court for the Northern District of Texas by Bamerilease Capital Corporation ("BA") in November of 1985. The case was filed against GEX Hardy, Inc., GEX Kentucky, Inc., General Exploration Corporation, and Holmes Land Company (collectively, "GEX Companies"), and Eugene E. Nearburg, ("Petitioner"), the companies' chief executive officer and the largest single stockholder of the parent company. The suit alleged various breaches of contract and various types of tortious conduct by all of the defendants. On April 16, 1986, several months after the filing of the complaint, the four GEX Companies filed bankruptcy petitions. The claims against the GEX Companies have been resolved in the Chapter 11 cases.

In January 1989, this case was transferred to the United States District Court for the Northern District of Ohio pursuant to BA's motion to transfer. On October 20, 1989, the district court set a November 6, 1989 trial date of this case. Later, the trial date was changed to November 8, 1989. Thereafter, the parties began negotiations in an attempt to settle the case. It is highly disputed whether a settlement agreement was ever actually reached.

Thereafter, BA filed a Motion to Enforce Settlement which claimed an enforceable settlement agreement based on a merger and extinguishment of their earlier claims. Nearburg denied the Agreement and issue was joined.

At that point, the action became a suit on a contract (Settlement Agreement) by B.A., subject to resolution at a jury trial.

However, the trial judge (consistent with a line of cases emanating from Sixth Circuit Court of Appeals) did not allow this issue to be set for jury trial as he had on the original trial on the merits. Instead, he summarily enforced the Settlement

Agreement without a jury trial, without even a full evidence hearing, and instead with only a so-called Rule 104(a) evidentiary hearing, and he entered a Judgment based on the alleged settlement against Nearburg.

JURISDICTION

The Opinion of the Court of Appeals was delivered March 3, 1992. See Appendix A, p. 1a *infra*. The Judgment of the Court of Appeals was also entered March 3, 1992. The Order of the Court of Appeals denying Nearburg's Motion for Rehearing was entered April 23, 1992.

The Jurisdiction of this Court to review the judgment of the Sixth Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit Court of Appeals has created a separate and distinct rule of law and procedure relating to the establishment and enforcement of settlement agreements in cases coming before it. Although a request to enforce a settlement agreement represents nothing more than a new, substituted claim for enforcement of contract (and the incumbent merger and extinguishment of the earlier underlying claims), that Court of Appeals has consistently held that because of public policy considerations, including especially the easing of the requirements on the "overburdened courts", the enforcement of settlement contracts should be held to a different standard than the enforcement of other contracts. *Aro Corporation v. Allied Witan Co.*, 531 F.2d 1368; *Kukla v. National Distillers Prods. Co.*, 483 F.2d 619 (6th Cir., 1973); *Brock v. Scheuner*, 841 F.2d 151 (6th Cir., 1988); *Sugardale Foods, Inc. v. Uncle Bens, Inc.*,

No. 88-3641, unpublished op., 1989 U.S. App. Lexis 3050 (6th Cir. March 14, 1989).

According to this well established line of Sixth Circuit cases, a trial court can "summarily enforce" such a settlement agreement, even when a "substantial factual dispute exists with respect to the entry into the settlement agreement" (which the Court found existed in this case). The Sixth Circuit requires only an "evidentiary hearing", not a properly conducted jury trial on the merits with full and adequate due process protection.

Moreover, it is this trial judge's practice, he indicated on several occasions, to conduct such "evidentiary hearing" in the most summary of fashions, pursuant to Rule 104(a) of the Federal Rules, rather than before a jury as demanded, and rather than pursuant to the appropriate Federal Rules of Procedure and Federal Rules of Evidence. (See Appendix B).

In the present case, this resulted in the admission into evidence (and consideration of) hearsay evidence (the very letter "Agreement" relied on by the Respondent), the refusal of the Court to allow full pre-trial discovery on the settlement issue (because he felt it was not appropriate under a Rule 104(a) hearing) and generally deprived the Petitioner of the entire body of due process considerations written into the Federal Rules of Civil Procedure. Yet, the Sixth Circuit found this procedure consistent with their policy of summary enforcement of settlement agreements, "whenever policy considerations so permit."

Petitioner Nearburg specifically requested a trial on the issue of the existence and enforceability of the purported settlement agreement, and at all times objected to anything short of a full trial. Yet, the lower court denied this request, and instead held only the evidentiary hearing under Rule 104(a) of the Federal Rules of Evidence. The lower court thus entered a money judgment for BA in the amount of more than $1.3 million, without permitting Petitioner to fully and fairly litigate

all of the issues, in violation of the due process clause of the fourteenth amendment to the U.S. Constitution.

Federal Rule of Evidence 104(a) provides:

> "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privilege."

This rule should be used for the limited purpose of separating preliminary evidentiary questions from consideration by the jury. C.A. Wright & K.W. Graham, Federal Practice and Procedure: Evidence §5052 at 252 (1977); 10J. Moore, Moore's Federal Practice §104.12[1] (2d ed. 1985). Here, neither the qualification of a party to be a witness, nor the existence of a privilege, nor the admissibility of evidence was to be determined by the court. Rather, the court was asked to resolve a fundamental issue of contract law, the existence of an enforceable, final contract. The use of Rule 104(a) does not, by its own terms, include the resolution of this kind of issue.

Moreover, a Rule 104(a) affords neither the protections nor the rights of a full trial under the Federal Rules of Civil Procedure. Unlike a full trial, otherwise inadmissible evidence is allowed in a 104(a) hearing. Here the court relied on inadmissible hearsay evidence in making its determination. The lower court expressly referred to a letter of November 6, 1989 from BA's attorney to the court in its Memorandum of Opinion. Further, Petitioner Nearburg's attempt to depose twelve representatives of BA on the question of settlement was denied by the court, on the basis that discovery is not appropriate in a Rule 104(a) proceeding as it is in a full trial. Additionally, in this type of a proceeding, a court may allow leading questions, as the lower court did here. The lower court violated the Petitioner

Nearburg's fourteenth amendment right to due process when it misused an evidentiary hearing to substitute for a full trial.

The guarantee of due process calls for a hearing appropriate to the nature of the case. *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *United States v. Raddatz*, 447 U.S. 667 (1980), *rehearing denied* 448 U.S. 916 (1981) *quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Doe v. Staples*, 706 F.2d 985, 990 (6th Cir. 1983). The only appropriate hearing here would have been a full trial.

CONCLUSION

This policy of the Sixth Circuit Court of Appeals in attempting to find and enforce settlement even though specific procedural and due process protections are ignored is clearly unconstitutional. This practice should be condemned and the decision of the Court in this case should be reversed.

Respectfully submitted,

Richard Jackson
Counsel of Record
Richard Jackson & Associates
3738 Oak Lawn, Suite 101
Dallas, Texas 75219
Telephone - (214) 522-5977
Facsimile - (214) 522-5978

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this the 22nd day of July, 1992, a true and correct copy of the above and foregoing document was served via United States mail, postage prepaid, upon all counsel of record.

/s/
Richard Jackson

APPENDIX

APPENDIX A

BAMERILEASE CAPITAL CORP.,
Plaintiff-Appellee,

v.

Eugene E. Nearburg
Defendant-Appellant

No. 90-3452

United States Court of Appeals
Sixth Circuit

March 3, 1992

Appeal from the United States District Court for the Northern District of Ohio

Before JONES and NELSON, Circuit Judges; and MILES, Senior District Judge.

I

This case was originally filed in the United States District Court for the Northern District of Texas by Bamerilease Capital Corporation in November of 1985. Subsequent to the filing of this case, Bamerilease Capital Corporation changed its name to BA Leasing & Capital Corporation ("BA"). The case was filed against GEX Hardy, Inc., GEX Kentucky, Inc., General Exploration Corporation, and Holmes Land Company (collectively, "GEX Companies"), and Eugene E. Nearburg, the companies' chief executive officer and the largest single stockholder of the parent company. The suit alleged various breaches of contract and various types of tortious conduct by all of the defendants. On April 16, 1986, several months after the filing

of the complaint, the four GEX Companies filed bankruptcy petitions, causing the case to be stayed with respect to them. The claims against the GEX Companies have been resolved in the Chapter 11 cases.

In January 1989, this case was transferred to the United States District Court for the Northern District of Ohio pursuant to BA's motion to transfer. On October 20, 1989, the district court set a November 6, 1989 trial date for this case. Later the trial date was changed to November 8, 1989. Thereafter, the parties began negotiations in an attempt to settle the case. A meeting to this end was held in Dallas, Texas, on November 3, 1989. Different settlement approaches were discussed at the November 3 meeting, and by the end of the day a "tentative" settlement agreement had been reached. On November 6, 1989, BA's counsel sent Nearburg and his counsel a letter outlining her understanding of the structure and terms of the agreement reached on November 3, 1989.

On November 7, 1989, the court received three letters. Letter number one was a letter to Judge Manos from BA's counsel. It stated that a "tentative" settlement agreement between Bamerilease and Nearburg had been reached on November 3, 1989, and outlined the agreement. Letter number two was a letter from Nearburg's counsel to BA's counsel stating that "[w]e are in agreement with the structure of the settlement as outlined in your letter of November 6, 1989, to Judge Manos with the following substituted language." J.A. at 44. This letter was signed by Nearburg. Finally, letter number three was from Nearburg's counsel to BA's counsel, stating that "I enclose a copy of a Fax [telecopy] letter which Mr. Nearburg and I have signed to evidence the agreement. I think you can represent to the Court that the matter is finally concluded." J.A. at 46.

After delivering these letters to the court, BA's counsel commenced drafting the documentation in support of the settlement agreement. On November 14, 1989, BA's counsel sent

Nearburg's counsel a draft of the settlement agreement. On November 15, 1989, Nearburg voiced general dissatisfaction with the draft. The remainder of November 15 and the following day were devoted to negotiating parties' differences.

On November 17, 1989, the parties again met in Dallas, Texas, to affix their signatures to the final draft, which Nearburg refused to sign. Nearburg refused to honor the terms of the alleged settlement agreement, and BA filed a motion to enforce the settlement agreement. A full evidentiary hearing was conducted on this motion, and on April 16, 1990, the court entered judgment in favor of BA. This appeal followed.

The issues raised on appeal are: (1) whether the district court erred in failing to apply state law in ruling upon the enforceability of the settlement agreement; (2) whether the district court's proceedings violated Nearburg's right to due process by not affording him a full trial; (3) whether the district court's judgment violates the Full Faith and Credit Clause, the Due Process Clause, or both; (4) whether the district court's findings are supported by the record; (5) whether the district court erred in awarding attorneys' fees; and finally, (6) whether the district court erred in granting BA's motion to substitute parties.

II

The first and primary issue in this is appeal is whether the district court erred in failing to apply state law when ruling upon the enforceability of the alleged settlement agreement. For the reasons discussed below, we think the district court erred in failing to look to the appropriate state law.

"It is well established that courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them." *Brock v. Scheuner Corp.*, 841 F.2d 151, 154 (6th Cir. 1988). Settlement agreements are a type of contract and are therefore governed by contract law. *Hageman v.*

Signal L. P. Gas, Inc., 486 F.2d 479, 487 (6th Cir, 1973). Thus, "[w]hether [a settlement agreement] is a valid contract between the parties is determined by reference to state substantive law governing contracts generally." *White Farm Equip. Co. v. Kupcho*, 792 F.2d 526, 529 (5th Cir. 1986); *see also Lockette v. Greyhound Lines*, 817 F.2d 1182, 1185 (5th Cir. 1987) ("In this case, where jurisdiction is based upon diversity of citizenship, we will apply the substantive law of Louisiana to determine whether the settlement agreement allegedly entered into . . .is enforceable."); *Wong v. Bailey*, 752 F.2d 619, 621 (11th Cir. 1985) ("The construction and enforcement of settlement agreements are governed by principles of the state's general contracts law."). This is distinguishable from the question of "[w]hether a settlement agreement, . . .tested under state law, has been accepted by a federal court and properly incorporated into a valid and enforceable judgment [, which] is purely a matter of federal procedure." *White Farm*, 792 F.2d at 529.

The primary question on appeal is whether Nearburg entered into a settlement agreement, which is a question of contract law. Hence, it was incumbent upon the lower court to "apply the choice of law rules of the forum state." *Lee v. Hunt*, 631 F.2d 1171, 1174 (5th Cir. 1980), *cert. denied*, 454 U.S. 834 (1981). Therefore, we conclude that the district court erred in failing to look to state law when determining the enforceability of the settlement agreement.

III

Although the district court's failure to apply Ohio law to this problem was error, we find that applying the correct law produces the same result. Ohio's choice of law rules direct us to apply *lex loci* — the law of the place of the contract's making — to determine the validity or enforceability of a contract. *Arsham v. Banci*, 511 F.2d 1108, 1114 (6th Cir. 1975). The district court found that the settlement agreement was negotiated and made on November 3, 1989 in Texas. J.A. at 40-41, 49.

Thus, Texas law governs the enforceability of this settlement agreement.

Nearburg claims that Texas law would invalidate the agreement between the parties, because he never signed the final documents. "[T]he enforceability of a settlement agreement in a diversity case tried in a federal district court in Texas is governed by the provisions of Rule 11, Texas Rules of Civil Procedure." *Borden v. Banacom Mfg. and Marketing, Inc.* 698 F.Supp. 121, 123 (N.D. Tex. 1988). Rule 11 provides in relevant part that "no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record . . . ." *Id.* (quoting Tex.R.Civ.P.11).

Although at first blush this rule may seem to support the claims of the appellant, the Texas courts have not so interpreted it. The Texas courts do not insist upon a literal interpretation of the language, so long as the reason for Rule 11's existence is not overlooked: the rule is an attempt to prevent the "misunderstandings and controversies" that oral agreements sometimes generate. *Kennedy v. Hyde*, 682 S.W.2d 525, 529 (Tex. 1984) (Quoting *Birdwell v. Cox*, 18 Tex. 535, 537 (1857); *see also Borden*, 698 F.Supp. at 124 (letter setting out a draft of a previously reached settlement agreement, where the court had been informed that the parties had agreed on a settlement, found to be the "substantial equivalent" of a signed, written agreement); *Anderegg v. High Standard, Inc.* 825, F.2d 77, 81 (5th Cir. 1987), *cert. denied*, 484 U.S. 1073 (1988) (Texas courts will recognize formally written and signed statement of settlement or their substantial equivalents.). As the Texas Court of Appeals has interpreted it, "the purpose of requiring that agreements either be in writing or entered of record is that it avoids the untenable situation of the trial judge having to place each attorney on the stand to determine which one is telling the truth." *Fidelity & Casualty Co. of New York v. McCollum*, 656 S.W.2d

527, 528 (Tex. Ct. App. 1983). Such confusion is not a problem here. In the instant case, the parties exchanged letters, sending copies of most of them to the district court as well, in which they outlined in writing the settlement agreement made on November 3. These letters represented that an agreement had been reached, and it was on this ground that the district court removed their case from the docket. Two of these letters were signed by Nearburg himself; these and the rest were signed by his attorney. Therefore, we find that under Texas law, the parties made a valid, enforceable settlement agreement. Because this result is the same as that reached by the district court applying federal law, we hold that its error in choice of law was harmless, and we affirm the district court, not in its reasoning, but in its result.

IV

Nearburg next contends that the district court proceedings violated his rights to due process by not affording him a full trial. We disagree.

Nearburg requested a full trail before the district court on the issue of "the existence and enforceability of the purported settlement agreement, and objected to anything short of a full trial." Br. of Appellant at 11. The district court denied this request. The district court did, however, conduct several conferences on the issue and held an evidentiary hearing, allowing the parties to present evidence and witnesses on their behalf.

"This court has held that courts have the power to summarily enforce settlement agreements, though an evidentiary hearing should be held when a substantial factual dispute exists." *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir.) *cert. denied*, 429 U.S. 862 (1976). In the present case, a substantial factual dispute existed with respect to the entry into a settlement agreement. *See Kukla v. National Distillers Prods. Co.* 483 F.2d 619, 621-22 (6th Cir. 1973) (entry into agreement is substantial dispute requiring evidentiary hearing). The trial court held a

properly conducted evidentiary hearing, affording both parties the opportunity to be heard. Thus, the trial court did what was required of it and appellant's complaint here is without merit.

V

Nearburg also challenges the district court's grant of BA's motion to substitute parties. We find no error on the part of the district court here.

Federal Rule of Civil Procedure 25(c) provides in part: "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." Bamerilease Capital Corporation was the original named plaintiff in this case. Subsequent to the filing of this action, however, Bamerilease changed its name to BA Leasing & Capital Corporation. On March 26, 1990, the court granted plaintiff's motion to substitute BA for Bamerilease Capital Corporation, pursuant to Fed.R.Civ.P. 25(c).

Nearburg contends that because the substitution did not occur until after the date of the alleged settlement, BA Leasing & Capital Corporation must prove that it owns the cause of action asserted in this suit. We disagree.

The matter of substitutions due to a transfer of interest is within the discretion of the district court. *Bauer v. Commerce Union Bank*, 859 F.2d 438, 441 (6th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989). Nearburg has not shown that the district court abused its discretion in granting the motion for substitution. Therefore, we find that the district court used its discretionary powers properly.

VI

Nearburg raises three other issues in his brief: (1) that the district court's judgment violates the Full Faith and Credit

Clause or the Due Process Clause of the united States Constitution; (2) that the district court's findings were not supported by the record; and (3) that the district court erred in awarding attorneys' fees to the appellee as sanctions. After fully considering these issues upon briefs and oral argument, we find that they do not merit further discussion.

VII

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

DAVID A. NELSON, Circuit Judge, concurring. I agree that the judgment of the district court ought to be affirmed, and I agree with Judge Jones' analysis of Texas law. The same result would obtain, in my view, under federal law.,

I am uncertain whether the enforceability of the settlement agreement is dependent on state law or federal law. Diversity cases do sometimes present questions for which federal principles provide the rule of decision - see *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 n. 4 (6th Cir. 1982), a diversity case where federal law was applied in deciding a judicial estoppel question — and this court has repeatedly said, as did the district court in the case at bar, that federal trial courts possess inherent power to enforce settlement agreements entered into by litigants in cases pending before them. See, for example, Kukla v. National Distillers Products Co. 483 F.2d 619 (6th Cir. 1973), and *Purex Corp. v. Willis Day Properties, Inc.* (unpublished), 1990 U.S. APP. LEXIS 16038 (6th Cir. 1990), both of which were diversity cases. Whether federal trial courts exercising diversity jurisdiction have any inherent power to enforce settlement agreements that would not be enforceable under state law is an interesting question, but I would leave its resolution to another day; the issue is not presented by the case before us.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

BAMERILEASE CAPITAL CORPORATION,
Plaintiff,

v.

GEX HARDY, INC., ET AL.
Defendants.

Civil Action No. 89 CV 0160

PROCEEDINGS HAD BEFORE THE
HONORABLE JOHN M. MANOS,
COMMENCING AT 9:15 A.M.,
THURSDAY, FEBRUARY 8, 1990.

THE COURT: This is a 104(a) hearing. You understand that.

MR. JACKSON: I'm sorry. A what?

THE COURT: 104(a) hearing to determine the contract enforcement. A 104(a) hearing — in a 104(a), the Rules of Evidence don't apply with the exception of privilege. And the Court wants to hear all the information that might be gleaned in order that it can make up its mind about the contract enforcement.

MR. JACKSON: Judge, I'm sorry. I have to confess I don't know what a 104(a) hearing is. Is that different than a trial under the rules? And the federal rules, I take it, it is.

THE COURT: I will explain it to you in this sense. Under Rule 703, if an expert testifies, it used to be before the Frye test, was no longer part of Article VII, and expert testimony that an expert witness would be able to — this is off the record.

(Discussion had off the record.)

MR. JACKSON: Back on the record. So I'm positive what we are doing here, are you saying the proceedings here in your chambers are —

THE COURT: No, in court.

MR. JACKSON: When we are ready to go in the Courtroom —

THE COURT: Yes.

MR. JACKSON: — as I understand — let me say that I recall BameriLease is asking, it's asking for the determination that there was a contract and for enforcement of a contract.

THE COURT: Right.

MR. JACKSON: And we object to anything short of a trial on that fact issue subject to the rules. And I understand the rules before the court —

THE COURT: This is a 104(a) hearing. I'm telling you. Note your objection.

MR. JACKSON: Note our objection.

MS. SHEA-STONUM: Your Honor, while we are in here, may I address one other preliminary matter? When we filed our motion on December 8th, there was an opposition to that motion filed by Mr. Nearburg on or about December 27th. Subsequent to that, and after the first status conference on this matter which the Court held on January 12, 1990, an answer, so-called answer and counterclaim were filed.

THE COURT: There is no answer here; there is no counterclaim before this Court. Insofar as this hearing is concerned, this is a 104(a) hearing to determine whether or not a motion to enforce a settlement of a dispute that occurred from November the 3rd to November the 17th in Dallas, Texas, shall be enforced.

MS. SHEA-STONUM: Precisely.

THE COURT: That's what we were here for.

MS. SHEA-STONUM: What we seek is to make a motion to strike that answer.

THE COURT: Your motion is granted; there is no answer.

MR. JACKSON: We would like to have, if that is going to be an oral motion to strike our answer, we would like to be heard and

submit briefing to the Court. That's an important part of our position.

THE COURT: Your motion is denied.

MR. JACKSON And we'd like to move for a continuance of this hearing until we could have the pleadings properly brought before the Court.

THE COURT: Motion is denied. Let's proceed.

(The foregoing proceedings were had in chambers.)

- - - - -

THE COURT: Please be seated.

We are before the Court on the matter of the *BameriLease Capital Corporation, Plaintiff, vs. Eugene Nearburg, Defendant.*

Before the Court is a motion of the Plaintiff BameriLease Capital Corporation to enforce a particular settlement it maintains was entered into in Dallas, Texas, sometime between November the 3rd and November the 17th. This motion is now before the Court. The Court is conducting a 104(a) hearing regarding the settlement.

You may proceed.

MS. SHEA-STONUM: Your Honor, in this Court's record are two letters, one dated —

THE COURT: You can proceed by making a preliminary statement is you wish. The Court submits, however, that it has the briefs

of both parties, both sides. It has read the briefs of both sides and would ask whether or not each side would waive making a preliminary statement.

MS. SHEA-STONUM: We certainly would, you Honor.

MR. JACKSON: Yes, your Honor.

THE COURT: All right.

MS. SHEA STONUM: Your Honor —

THE COURT: You may call your first witness.

MS. SHEA-STONUM: I would call Mr. Hanson to the attorney's podium.

MR. JACKSON: Your Honor, we object to Mr. Hanson being called to the stand because —

MS. SHEA-STONUM: He is not being called to the stand.

MR. HANSON: We are going to call Roger Duncan.

MR. JACKSON: I'm sorry. I misunderstood.

MR. HANSON: At this time, BameriLease calls Roger Duncan.

- - - - -

ROGER T. DUNCAN

of lawful age, called as a witness by the Plaintiff, after having been first duly sworn, was examined and testified as follows:

MR. JACKSON: Your Honor, may I ask a question before we begin the testimony of this witness of the Court to make sure of the procedure?

THE COURT: You may.

MR. JACKSON: I understand from the proceedings held in the Court's chambers a few moments ago that this is to be a 104(a) hearing as opposed to a trial under the Federal Rules.

THE COURT: Sir, 104(a) is part of the Federal Rules of Evidence. And what it permits is wide open examination and cross examination.

MR. JACKSON Okay.

THE COURT: So the Court may be enlightened about the events which occurred in Dallas between November the 3rd and November the 17th, and as they pertain to the settlement which the plaintiff maintains was arrived at. Now, 104(a) is a vital part of the Federal Rules of Evidence, and the Article privilege is the only article of all of the articles that governs. You may ask any questions, you have wide open examination in cross examination.